

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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JANE DOE, et al.,

Plaintiffs,

vs.

1:20-CV-840

HOWARD ZUCKER, et al.,

Defendants.

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Transcript of a Telephone Conference held on  
January 6, 2021, the HONORABLE BRENDA K. SANNES,  
United States District Judge, Presiding.

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A P P E A R A N C E S

(By Telephone)

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1 (The Court and all counsel present by  
2 telephone, 10:00 a.m.)

3 THE CLERK: Good morning, we're here with Judge  
4 Sannes in the case Doe v. Zucker, 20-CV-840. Counsel, please  
5 state your appearances for the record, starting with  
6 plaintiff. Do we have counsel for the plaintiffs on the  
7 line?

8 MS. HOLLAND: This is Mary Holland for plaintiff  
9 but Sujata Gibson and Michael Sussman should be on.

10 THE COURT: I'm sorry, could you --

11 MS. HOLLAND: My name is Mary Holland.

12 THE CLERK: Spell your last name for the record.

13 MS. HOLLAND: H-o-l-l-a-n-d.

14 THE CLERK: Thank you.

15 MR. McCARTIN: Your Honor, this is Michael  
16 McCartin, and I'm with Andrew Koster with the AG's office for  
17 the state defendants in this matter.

18 THE COURT: Thank you.

19 MR. KLEINBERG: Good morning, your Honor, this is  
20 Adam Kleinberg from Sokoloff Stern, attorney for South  
21 Huntington Union Free School District, Three Village Central  
22 School District, Ithaca City School District, Albany City  
23 School District, and there are various officials that were  
24 sued in this matter. I'm also joined on the line by Gregg  
25 Johnson who's cocounsel, Chelsea Weisbord, and Loraine

1 Jelinek.

2 THE COURT: Good morning.

3 MR. KLEINBERG: Good morning.

4 THE COURT: And is there counsel on the line for  
5 the Lansing Central School District?

6 (No Response.)

7 THE COURT: Is there counsel on the line for David  
8 Migliorino? If counsel just joined, could you please  
9 identify yourself?

10 MS. GIBSON: Hi, Judge, this is Sujata Gibson for  
11 Children's Health Defense and the plaintiffs.

12 THE COURT: Good morning.

13 MS. GIBSON: Good morning.

14 THE COURT: And let me ask again, is there any  
15 counsel for the Lansing Central School District?

16 (No Response.)

17 THE COURT: Or any counsel for David Migliorino?

18 (No Response.)

19 THE COURT: Okay, why don't we go forward since it  
20 is after 10:00. Let me just say, all parties who are not  
21 attorneys, anyone who is not an attorney, please mute your  
22 telephones, I don't think all the telephones are muted and  
23 that makes it very hard for the court reporter to hear the  
24 argument from counsel.

25 Presently before the court are the defendants'

1 motions to dismiss and the plaintiffs' motion to amend the  
2 complaint. I have reviewed the proposed amended complaint  
3 and I am considering the merits of the defendants' arguments  
4 to dismiss in light of the proposed amended complaint.

5 And let me say at the outset that I understand the  
6 frustration parents have with respect to vaccine regulations,  
7 but I do have to apply the law that's been set by the  
8 Second -- by the Supreme Court and Second Circuit Court of  
9 Appeals.

10 So let me start with plaintiffs' counsel and ask,  
11 given the framework of the court's ruling on injunctive  
12 relief, which applies a rational basis test, how do these  
13 regulations not pass the rational basis test?

14 MS. GIBSON: Your Honor, I didn't see any  
15 discussion on that ruling, are you referring to the ruling  
16 that was certified this morning?

17 THE COURT: No, I'm referring to the court's ruling  
18 on injunctive relief.

19 MS. GIBSON: Oh, I'm sorry, your decision and  
20 order. So the rational basis test, there was a circuit split  
21 but the law has actually dramatically changed in the last  
22 month. The Supreme Court just decided the *Catholic Diocese*  
23 case in -- of *Brooklyn v. Cuomo*, and that case, *Roman*  
24 *Catholic Diocese v. Cuomo*, you know, clearly clarifies this  
25 kind of confusion in the law about whether rational basis

1 needs to apply in these cases involving public health and the  
2 effect of *Jacobson* on tiers of scrutiny, and the court  
3 rejected the arguments that there should be any impact on  
4 tiers of scrutiny and clarified that we need to look at all  
5 of -- any case that involves the fundamental right through  
6 those tiers of scrutiny using strict scrutiny. And then  
7 *Agudath Israel* here in the Second Circuit which was decided  
8 on December 28th, 2020 also went into quite a bit of detail  
9 on that and the effect of *Jacobson* and has since then made it  
10 very clear that we now have these strict scrutiny --

11 THE COURT: And let me, let me just stop you there  
12 because aren't those cases freedom of religion cases and  
13 strict scrutiny applies because it's a right, constitutional  
14 right to freedom of religion?

15 MS. GIBSON: Well, those cases clarify that anytime  
16 any fundamental right is involved, we need to use strict  
17 scrutiny and that there's no new -- no deference or special,  
18 special, you know, standard that's triggered by public  
19 health. So this case is involving multiple fundamental  
20 rights including, you know, the right to refuse medical  
21 treatment, the right of parents to make medical decisions for  
22 their children in cases where, especially where they're  
23 supported by a license -- state-licensed physician, and the  
24 right of -- the self-defense right, the right to life, to  
25 avoid regulations that could cause you harm, particularly

1 where the state-licensed physician has certified that that is  
2 true and particularly on a motion to dismiss where all of  
3 these children have alleged and have presented plausible  
4 evidence that they are in fact at risk of serious harm or  
5 death from one or more of these vaccine doses. That right is  
6 very clearly defined as a fundamental right.

7 THE COURT: And let me just ask you, assuming I  
8 don't think the case law supports that position, how do these  
9 regulations, or do you have any argument that these  
10 regulations do not pass a rational basis test?

11 MS. GIBSON: Yes, your Honor, I do. It wouldn't be  
12 rational to place children at risk of harm, particularly for  
13 the vaccines that only have the ability to protect from the  
14 symptoms, cannot have any kind of, you know, cannot help  
15 others from not getting infected. So there's a lot of these  
16 vaccines in the schedule that, we're looking at that now, as  
17 the COVID vaccine, there are some vaccines that can prevent  
18 symptoms but can't stop asymptomatic transmission and there  
19 are some vaccines that can actually prevent transmission as  
20 well as symptoms. And so many on the list and many of these  
21 plaintiffs are only missing those in the category that can't  
22 protect anyone else. Their doctors have said that they're at  
23 risk of serious harm or death, many of their, you know, two  
24 of them -- three of them have had family members who did in  
25 fact die from those vaccines, and it was not even -- it's not

1 even rational to force them then to get those vaccines in  
2 order to go to school, or to say that they can't go to online  
3 school. So there's no kind of rational relationship between  
4 these requirements and a violation of these fundamental  
5 rights that the parents and children enjoy.

6 THE COURT: Isn't it rational to require a  
7 medically-based contraindication or precaution?

8 MS. GIBSON: Yes, but that is not what this  
9 complaint alleges happened. So all of them have alleged that  
10 they, and they all have, submitted medically-based,  
11 evidence-based reasons for why they can't take the vaccine.  
12 They didn't just come up with it, you know, off the top of  
13 their heads. Licensed, state-licensed physicians have  
14 certified that they are at risk of serious harm or death.  
15 Many of these children have had multiple state-licensed  
16 physicians certify that and go into extensive detail on the  
17 evidence-based reasons, peer-reviewed science, you know,  
18 other, other bases. Which also brings why this is  
19 irrational, these limiting factors that the defendants have  
20 individually and collectively kind of adopted are irrational  
21 because even the CDC says that those ACIP guidelines, the  
22 very narrow ACIP guidelines which all of these defendants  
23 have been in practice using, are not meant to be a  
24 population-based concept, cannot define the medical  
25 exemption. In fact, you know, we had quoted in the complaint



1 an e-mail from the person who wrote the CDC guidelines who is  
2 the representative of the ACIP committee who says these  
3 cannot be used, you know, these ACIP guidelines are not a  
4 space to use as the limits of a medical exemption, they're  
5 meant for practitioners who can then expand upon that based  
6 upon, you know, clinical judgment and evidence-based reasons  
7 with each specific child because this doesn't define the  
8 limits of the medical exemption. And so now, even though  
9 that's the case, we have all these defendants using this very  
10 narrow criteria that just by its nature is going to exclude  
11 hundreds of medically fragile very vulnerable children and  
12 subject them to risk of harm and death.

13 THE COURT: And as I understand the complaint, in  
14 many of these cases, the doctor at the -- in her capacity as  
15 the director of the Bureau of Immunizations determined that  
16 there was not a medical contraindication or precaution. What  
17 case law supports the federal court's power to second guess  
18 decisions like that that are made by public health  
19 professionals?

20 MS. GIBSON: Well, again, I will point to *Roman*  
21 *Catholic Diocese* and *Agudath Israel*, the December 28th  
22 decision where they very clearly say the federal courts have  
23 to second guess those when constitutional questions have been  
24 brought before them, so is it constitutional. You know, many  
25 of these cases, the Department of Health does not have any

1 kind of reviewing opinion, but to be -- for the few cases  
2 that defendant Rausch-Phung did weigh in on, for example in  
3 the Coe family case where she said that the death of two  
4 family members was not an ACIP condition listed in the ACIP  
5 contraindications and so she recommended against dismissal.  
6 You know, the federal government has to look at that. They  
7 very clearly say in *Roman Catholic Diocese* and in *Agudath*  
8 *Israel* that it is the court's responsibility to look at that  
9 and all of the *South Bay* notions from *South Bay Pentecostal*  
10 that there's this deference that's just like a deference  
11 that's supposed to be afforded, that has been expressly  
12 changed now by the Supreme Court and the Second Circuit.

13 THE COURT: And with respect to the rehabilitation  
14 claim, the regulations appear to be on their face neutral,  
15 facially neutral. What disability or disabilities do the  
16 regulations discriminate against?

17 MS. GIBSON: Well, they're not facially neutral  
18 because they exclude people with physical conditions that  
19 don't fall into the three ACIP criteria.

20 THE COURT: And let me just stop you there because  
21 you've said that repeatedly and we went over this the last  
22 time we had an argument. The regulation says consistent with  
23 ACIP guidance or other nationally recognized evidence-based  
24 standard of care.

25 MS. GIBSON: And this is an as-applied and facial

1 challenge and the complaint clearly outlines how the  
2 individual defendants and members of the Department of Health  
3 as applied do not apply it that way. They apply it very  
4 narrowly so that it only -- it encompasses a large number of  
5 conditions. And that's, you know, detailed for each child in  
6 this, in this complaint, how their conditions were excluded  
7 either because they didn't fall under the, you know, the  
8 three conditions recognized by ACIP, and many of these  
9 reviewing doctors wrote letters expressly stating that they  
10 only consider ACIP and Dr. Rausch-Phung has written letters  
11 which does not, do not consider anything other than ACIP.  
12 So, so, if you have a condition that doesn't fall within ACIP  
13 and you're unable to vaccinate because of that condition for  
14 one or more of the vaccine doses, then you are being  
15 discriminated against because of the vaccine.

16 THE COURT: And just looking at the regulation,  
17 what nationally recognized evidence-based standards of care  
18 do the plaintiffs in this case, do their contraindications or  
19 precautions fall within?

20 MS. GIBSON: I think that that's -- it's an  
21 interesting question what nationally recognized  
22 evidence-based standards of care even mean. A lot of lawyers  
23 have parsed that and written, you know, lengthy letters back  
24 and forth and it's unclear what that even means. Does that  
25 mean, you know, the Institutes of Medicine has written a

1 report? You know, because we've laid out in the complaint  
2 how the federal government, for example, compensates a number  
3 of conditions that are not covered by ACIP, or one of the few  
4 other kind of guidelines that the Department of Health has  
5 mentioned. And so is that nationally recognized? I mean,  
6 the federal government compensates those with table injuries  
7 for vaccine injuries and reasons not to vaccinate, the  
8 Institutes of Medicine have lengthy reports, but the problem  
9 here is that if you are just limiting it to practitioners'  
10 guidelines or trade organization guidelines, that's not going  
11 to be a population-based concept as the CDC has itself made  
12 clear. This is going to be a guide for practitioners but  
13 cannot encompass all reasons and this needs to be an  
14 individually based decision, based on science, based on  
15 evidence of course, these are doctors, they're licensed to  
16 practice in the state and that's their responsibility but ...  
17 it can't be a narrow, you know, set of guidelines from this  
18 organization or that organization because it won't cover  
19 everybody that needs protection.

20 THE COURT: And then the state argues that there  
21 are other nationally recognized evidence-based standards of  
22 care, including the Infectious Disease Society of America,  
23 the American Academy of Pediatrics, American Academy of  
24 Family Physicians.

25 MS. GIBSON: I would argue first of all, I would

1 object to that evidence at all, this is a motion to dismiss,  
2 so that's not in our complaint, it's never been raised with  
3 any of our plaintiffs when we've challenged these decisions  
4 that there are those options available, ACIP was the only  
5 thing that anyone said was available. But in any event, I  
6 think, you know, factually -- so I would object to the  
7 state's assertions of fact, those are factual issues that are  
8 contested that need to be explored. To the extent there are,  
9 you know, other guidelines, I think we'd also have to take a  
10 look at them and see if, similar to the CDC, they're meant to  
11 just be guidelines for practitioners, not an exhaustive list  
12 of who's covered.

13 Also I'll point to *Doe v. Bolton* again and say the  
14 court has been very clear with medical exemptions that you  
15 can't limit, you can't limit the physicians' criteria that  
16 they're going to be using to determine when a medical  
17 exemption is necessary.

18 THE COURT: I see. And the medical exemption form  
19 is on the Department of Health, New York State Department of  
20 Health website. Is there any reason why the court couldn't  
21 take judicial notice of that medical exemption form?

22 MS. GIBSON: Yeah, but the form doesn't, you know,  
23 doesn't address the as-applied challenges. Whether the form  
24 says nationally recognized evidence-based standards of care  
25 is irrelevant to whether the actual defendants considered

1 that, which they didn't in these cases. If there was a  
2 declaratory judgment that, you know, the -- all medical  
3 exemptions had to be accepted if they fell under, you know, a  
4 sufficient reading of nationally recognized evidence-based  
5 standards of care such that they would cover any child who is  
6 at risk through evidence-based reasons, that would be fine,  
7 but that's not what has happened in practice.

8 THE COURT: And I understand your arguments about  
9 the regulation and the form, but my question is just a simple  
10 one. Is there any reason why the court couldn't take  
11 judicial notice of that medical exemption form?

12 MS. GIBSON: I don't see any reason -- I mean, I  
13 think the inferences couldn't be drawn that that is what is  
14 used, but I believe it's, so the court can only take notice  
15 of -- I mean, the facts have to be the four corners of the  
16 complaint and then, you know, to the extent that there are  
17 documents that -- I mean, I think that the court could take  
18 judicial notice of the form.

19 THE COURT: Okay. And then with respect to John  
20 Doe, the complaint indicates that the Commissioner of  
21 Education denied his request for relief. As I understand it,  
22 that opinion is actually in the record as Docket 54-4, is  
23 there any reason why the court couldn't take judicial notice  
24 of the fact that Docket 54-4 is the Commissioner of  
25 Education's ruling denying John Doe's request for relief?

1 MS. GIBSON: I think, your Honor, I didn't brief  
2 this issue but I was looking at case law yesterday and I  
3 would love an opportunity to brief it. To the extent that  
4 the inferences are going to be drawn on contested issues of  
5 fact based on outside documents that contradict the facts in  
6 the complaint, I think that that is improper. But I am happy  
7 to submit arguments on that if the court would like.

8 THE COURT: And I do understand that argument and I  
9 do think that argument is valid. My only question is whether  
10 the court could take judicial notice of the ruling, so -- of  
11 the fact that the Department of Education denied the request  
12 stating X, Y, and Z, the ruling by the Commissioner of  
13 Education.

14 MS. GIBSON: I -- I'm so sorry, your Honor, but I  
15 can't remember, did we amend the complaint to mention it?

16 THE COURT: I believe the complaint mentions the  
17 fact that the Commissioner of Education denied John Doe's  
18 request for relief.

19 MS. GIBSON: I think that the court could take  
20 judicial -- I mean, wouldn't even have to because the  
21 complaint already says it, right?

22 THE COURT: I was -- I believe the decision is  
23 Docket 54-4, and the ruling is something I would like to take  
24 judicial notice of.

25 MS. GIBSON: I think the rationale for the decision

1 is full of contested issues of fact and so I would object to  
2 that being part of the complaint or taken into consideration  
3 for dismissing this motion because the Commissioner of  
4 Education never had a hearing on the facts and a lot of the  
5 things that they set forth are contested facts that our  
6 client, my client has a right to have looked at in a court of  
7 law.

8 THE COURT: And again, I wouldn't be asking to take  
9 judicial notice of the facts but just the ruling. If you'd  
10 like an opportunity to brief that, I'm happy to give you a  
11 week to submit a letter brief on that issue.

12 MS. GIBSON: Certainly, your Honor. Thank you.

13 THE COURT: So would, by January 14th give you  
14 enough time?

15 MS. GIBSON: Yes, your Honor, that would be fine.

16 THE COURT: Okay. And in the amended complaint,  
17 you have further developed your legal claims. Given the  
18 framework that the court applied in its ruling on injunctive  
19 relief, the court doesn't find the amended complaint  
20 sufficient to state a cause of action. Is there any basis  
21 for a further amendment?

22 MS. GIBSON: I guess it would depend on whether --  
23 well, what grounds the court found lacking. If there are  
24 facts that we could add that we hadn't mentioned or more  
25 detail that we can provide, I would preserve the right to try



1 to do that.

2 THE COURT: Well, I guess I'm asking, applying the  
3 rational basis test, is there any basis for further  
4 amendment?

5 MS. GIBSON: Applying the rational basis test. Is  
6 the court asking if the rational basis test were applied to  
7 fundamental rights, would there be a basis for further  
8 amendment of the facts in the complaint?

9 THE COURT: I'm indicating that I believe the  
10 rational basis test is the test that I'm required to apply  
11 under the Supreme Court and Second Circuit law and given  
12 that, is there any basis for a further amendment?

13 MS. GIBSON: I'm sorry, your Honor, I would just  
14 have to see your decision to see whether there's anything  
15 that, you know, we felt that we could, we could add, but --

16 THE COURT: Okay, okay, that's fair enough.  
17 Anything further, Ms. Gibson, on the motion that you'd like  
18 to add in response to the motions to dismiss?

19 MS. GIBSON: Yes, I guess I would just -- well,  
20 I'll reserve for later, your Honor, on that question. Thank  
21 you. I don't have anything at the moment other than to  
22 question whether the rational basis can be applied, if you  
23 wanted any more information about the actual fundamental  
24 rights at issue here, but ...

25 THE CLERK: Judge, this is Renata, I just want to

1 let you know I got an e-mail for counsel for defendant  
2 Migliorino, they were having trouble joining but it looks  
3 like they joined now, just wanted to let you know they're on.

4 THE COURT: Thank you, and let me get your  
5 appearance.

6 MS. RICCARDULLI: Hi, your Honor, yes, I apologize.  
7 I was somehow given the wrong dial-in information. When I  
8 dialed into the call, there were other parties waiting so I  
9 assumed it was the right one and apparently no one started  
10 talking so that's when I e-mailed, but it's Meishin  
11 Riccardulli from Biedermann Hoenig Semprevivo for defendant  
12 Brother David Migliorino.

13 THE COURT: Great, thank you very much. And is  
14 Mr. Ryan or anyone from the Lansing Central School District  
15 on the phone?

16 MS. TASHJIAN: Yes, your Honor, this is Roxanne  
17 Tashjian, Jim Ryan is also on the phone from Cullen Dykman  
18 for Cocksackie-Athens School District, Lansing Central School  
19 District, and Penfield Central School District and various  
20 administrators.

21 THE COURT: Could you spell your last name?

22 MS. TASHJIAN: Sure, it's T as in Thomas, a-s as in  
23 Sam, h-j-i-a-n.

24 THE COURT: Okay, thank you. And let me ask  
25 counsel for the state defendants, is there anything you would

1     like to say at this hearing?

2             MR. McCARTIN: Yes, your Honor. I'll be brief.  
3     First of all, good morning and may it please the court.  
4     Before I begin, your Honor, I wanted to point out and  
5     highlight the fact that late yesterday afternoon, the Second  
6     Circuit entered an order, it was a two-sentence order that  
7     denied plaintiffs' motion for an injunction in this case. So  
8     based upon that, based upon the fact that the court has also  
9     entered an order back in October applying, dealing with the  
10    plaintiffs' application for preliminary relief and the fact  
11    that the circuit has now added its weight of authority to  
12    this court's prior ruling, we'll be very brief here.

13            In short, the court can grant the state defendants'  
14    motion to dismiss for the same reasons that the court found  
15    that the plaintiff did not show a likelihood of success on  
16    the merits. As the court knows, two Supreme Court cases,  
17    *Jacobson* and *Zucht*, and the more recent Second Circuit  
18    decision in *Phillips* control here. So when it comes to  
19    immunization issues, the court should apply a rational basis  
20    analysis. Plaintiffs, we assert, wrongly argue that strict  
21    scrutiny applies because a fundamental right is at stake.  
22    That's incorrect. Plaintiff has cited numerous abortion  
23    rights cases in support of this proposition, but those cases  
24    simply do not apply here. No one is forcing the plaintiffs  
25    to be immunized; rather, plaintiffs here must be either

1 immunized or they must show that a physician determines that  
2 a child has a medical contraindication consistent with the  
3 CDC's guidance, or importantly, other nationally recognized  
4 evidence-based standards of care. That's what the regulation  
5 says, your Honor. So stated differently, when it comes to  
6 immunization, there is simply no fundamental right not to be  
7 required to conform to the CDC guidance or other nationally  
8 recognized evidence-based standards of care.

9 Furthermore, because receiving an education is not  
10 a fundamental right, and because plaintiffs can choose to be  
11 homeschooled instead of being immunized, plaintiffs' strict  
12 scrutiny argument completely fails.

13 Additionally, your Honor, plaintiffs bring only a  
14 facial challenge against the state defendants in their  
15 challenge to the 19 -- or the 2019 amendments to the  
16 regulation. This is crucial because to succeed on a facial  
17 challenge, plaintiffs must demonstrate that no set of  
18 circumstances exist under which the regulation would be  
19 valid, that the law is unconstitutional in all of its  
20 applications. Because the Supreme Court has stated that this  
21 is the most difficult challenge to mount successfully,  
22 because the regulation at issue here is not unconstitutional  
23 in all of its applications, the facial challenge fails. The  
24 regulation plainly has a legitimate sweep. Plaintiffs argue  
25 that the 2019 regulation's amendments are facially invalid

1 and unconstitutional because they theoretically allow for  
2 non-medically-trained local school officials to overturn  
3 opinions and recommendations of the plaintiffs' physicians.  
4 However, as long as the court can conceive of any potential  
5 circumstance, any -- in which a local school official could  
6 possibly make such a determination correctly, and therefore  
7 constitutionally, then the plaintiffs' facial challenge to  
8 this aspect of the regulation also would fail, your Honor.

9 We would also ask the court for those reasons and  
10 the reasons identified by Chief Justice John Roberts in the  
11 *South Bay* decision where he said that public officials, when  
12 they undertake acts in areas fraught with medical and  
13 scientific uncertainty, their latitude must be especially  
14 broad. Where those broad limits are not exceeded, they  
15 should not be subject to second guessing by an unelected  
16 federal judiciary which lacks the background, competence, and  
17 expertise to assess public health and is not accountable to  
18 the people. That was in *South Bay* decision, concurring  
19 decision, your Honor.

20 Now for all of these reasons, we think that the  
21 state defendants' motion to dismiss should be granted.

22 And as for the motion to amend the complaint, your  
23 Honor, it would be futile to amend the complaint, because the  
24 proposed amendments do not correct any problems in the  
25 original complaint. First of all, most of the amendments do

1 not even involve the plaintiffs' claims against the state  
2 defendants and the others are clearly inadequate. For  
3 instance, your Honor, plaintiffs state that they want to more  
4 clearly plead their substantive due process claim. However,  
5 the Second Circuit's *Phillips* decision completely blocks that  
6 claim, your Honor, so amending it would be futile.  
7 Additionally, your Honor, plaintiffs wish to amend the  
8 complaint to raise a claim related to being barred from  
9 attending online school. But again, just yesterday, the  
10 Second Circuit found no merit in that claim. So the  
11 amendment is also clearly futile.

12 With that said, your Honor, unless the court has  
13 any questions, the state defendants are prepared to submit on  
14 our papers as well as the court's prior decision in this  
15 action addressing injunctive relief and on the Second  
16 Circuit's order from yesterday. All three point the way  
17 toward dismissal of this action and toward denial of  
18 plaintiffs' motion to amend. Thank you, your Honor.

19 THE COURT: Thank you, Mr. McCartin. And let me  
20 ask, do any of the other defense counsel seek to argue their  
21 motions to dismiss?

22 MR. KLEINBERG: Your Honor, this is Adam Kleinberg,  
23 I just had a few things to supplement.

24 THE COURT: Yes.

25 MR. KLEINBERG: Thank you, your Honor. Again, I

1 represent a few of the school districts and their officials.  
2 Certainly not going to go over what the state defendants just  
3 argued, I join in each and every one of those positions.

4 As far as the qualified immunity issue which  
5 plaintiffs' counsel submitted a memorandum, I guess a letter  
6 memorandum of law yesterday, one of the things they argue is  
7 qualified immunity is normally asserted in the answer, but  
8 the Second Circuit has held in *Pani v. Empire Blue Cross*, a  
9 1998 decision, 152 F.3d 67, that affirmative defense of  
10 qualified immunity could be resolved as early as possible by  
11 the court and that's something that we see over and over and  
12 over in decisions, that qualified immunity should be resolved  
13 as early as possible. That would be at this time, the  
14 pre-answer stage.

15 As far as the clearly established right argument,  
16 we don't believe anything prohibited the state from enacting  
17 the qualifications it set on lawful medical exemption and I  
18 believe plaintiffs' counsel conceded that at the prior oral  
19 argument. Here, the school officials in this case we believe  
20 should be afforded qualified immunity as it was objectively  
21 reasonable to believe that state law was lawful at the time  
22 of these challenged decisions. It certainly was not clearly  
23 established law that school principals were forbidden from  
24 denying an exemption where a student provides a doctor's  
25 note. We would, you know, look only at page 17 of the

1 court's prior decision on the injunction motion where the  
2 court noted, states may vest officials with broad discretion  
3 in matters of application of health laws and that the  
4 plaintiffs were unlikely to succeed to show it was irrational  
5 or arbitrary to assign the first level of review to school  
6 principals. Plaintiffs' memo on qualified immunity cites the  
7 Second Circuit's decision in *Alliance for Open Society v.*  
8 *U.S. Agency*, that's on page 5 of their memo. In there the  
9 Second Circuit applied a heightened standard of review  
10 because compelling speech to receive a governmental benefit  
11 could not be squared with the First Amendment. Again,  
12 there's no such heightened scrutiny warranted here, and that  
13 goes hand in hand with plaintiff's argument this morning  
14 about the *Catholic Diocese* case. As your Honor questioned  
15 and plaintiffs' counsel indicated, that case related to the  
16 First Amendment, freedom of religion. That's not here.  
17 We've been over this already with plaintiffs before and the  
18 court agreed in the prior decision.

19 As far as the, you know, the arguments I believe  
20 are twisted in that the law lays out the definition for what  
21 would qualify for medical exemption and your Honor's  
22 questioned about it today. If the school district believes  
23 the students have not met that definition, they're bound to  
24 apply the law. And I believe to pretend that school  
25 principals do this in a vacuum without relying on medical



1 officials in their determination is disingenuous. But more  
2 importantly, it's disproven by the comprehensive submissions  
3 that the defendants made, you know, on the unsuccessful  
4 injunction application made by the plaintiffs. The school  
5 officials did not disregard medical opinions. As shown on  
6 papers, it's not just me declaring it or concluding it, they  
7 relied on medical officers, laid out their thought process  
8 and steps taken in reaching conclusions. So that allowed the  
9 court to go past the sweeping allegations in the pleadings  
10 and give the detailed review.

11 As far as the area of personal involvement on  
12 qualified immunity, on page 9 of their memo, plaintiffs  
13 allege the individuals created unconstitutional policy or  
14 custom. Just wanted to note for the court the decision in  
15 *Agosto v. New York City Department of Education*, it's a  
16 December 4th, 2020, Second Circuit decision in which the  
17 Second Circuit held a school principal could not be held as a  
18 policymaker for *Monell* purposes. So here we would argue the  
19 plaintiffs cannot establish liability against the school  
20 districts themselves for claims that these "rogue"  
21 administrators should have blindly accepted the doctors'  
22 notes. But more importantly, as we established on the  
23 injunction motion, there is no unconstitutional policy so we  
24 don't believe there's a viable claim against the individuals.

25 And additionally with another recent decision, your

1 Honor, plaintiffs allege that defendants were grossly  
2 negligent in supervising these medical professionals. There  
3 was a decision, *Tangreti v. Bachmann*, 2020 WL 7687688, was  
4 decided December 28th, 2020, so just about a week ago.  
5 The -- basically it overturned the *Colon* decision from 1995  
6 in favor of the *Iqbal* standard that the Supreme Court set in  
7 2009. And it basically says that supervisors can only be  
8 held liable for their own intentional misconduct or  
9 deliberate indifference, not gross negligence. So the Second  
10 Circuit is applying the *Iqbal* standard and I think that would  
11 apply here as well.

12 And just very briefly on some of the substantive  
13 arguments, as the court noted on page 14 of its prior  
14 decision on the injunction motion, the plaintiffs were  
15 unlikely to show the medical exemption regulations directly  
16 infringed on liberty interests, parent's right to refuse  
17 unwarranted medical procedures as they do not force the  
18 parents to consent to vaccination. That ties into the  
19 fundamental right and heightened scrutiny test.

20 On the as-applied challenges, we still continue  
21 that this should never have been a class action. Suffolk  
22 County school districts should not have been sued in the  
23 Northern District, a six-hour drive away on a good day.

24 And lastly, I just want to point out that we have  
25 raised in our papers but we've communicated with plaintiffs'

1 counsel many times on this and never got an answer, on the  
2 Albany School District, the students moved out of the  
3 district, so we have requested multiple times for the  
4 plaintiff to discontinue and, you know, here we are, with  
5 Albany still in the case despite there not being an Albany  
6 resident as a plaintiff.

7 With that said, your Honor, unless there's any  
8 further questions, we will rely on the papers and the court's  
9 prior decisions, and thank you very much for your time.

10 THE COURT: Thank you, Mr. Kleinberg. Does any  
11 other defense counsel seek to argue the motion to dismiss?

12 MS. TASHJIAN: Your Honor, this is Roxanne Tashjian  
13 of Cullen & Dykman for Cossackie-Athens School District,  
14 Penfield Central School District, and Lansing Central School  
15 District. We would just like to echo the sentiments of  
16 counsel and submit our motion.

17 THE COURT: Thank you, Counsel.

18 MS. RICCARDULLI: Your Honor, this -- I'm sorry.

19 THE COURT: Go ahead.

20 MS. RICCARDULLI: Your Honor, this is Meishin  
21 Riccardulli for Brother David Migliorino. We also would like  
22 to join in the arguments of our co-defendants, in particular  
23 South Huntington Union Free School District and Dr. David  
24 Bennardo. I would just like to make a point that we are in  
25 the unique position of, Brother David Migliorino is a

1 principal in a private Catholic high school. He made no  
2 independent determinations with regard to the sufficiency of  
3 the plaintiff's request for medical exemption. St. Anthony's  
4 was simply informed that plaintiff John Loe did not have a  
5 valid medical exemption for the required vaccinations and  
6 acted accordingly. Brother Migliorino never made any  
7 determinations with respect to his application or whether it  
8 was sufficient. He simply followed the state regulations.  
9 Otherwise we rest on our papers and join in the arguments of  
10 the co-defendants. Thank you for your time, your Honor.

11 THE COURT: Thank you, Counsel. And Ms. Gibson,  
12 anything in response?

13 MS. GIBSON: Yes, your Honor. I, I guess as a  
14 threshold matter, a number of the defendants have raised  
15 factual assertions and submissions outside of the four  
16 corners of the complaint. Again, I object to that. I will  
17 waive, I will -- it sounds like the court has made a decision  
18 about rational basis, I don't feel the need to submit further  
19 briefing on the question of the -- of the decision for John  
20 Doe, other than the argument that it should not be, that  
21 decision should not be included because it has factual  
22 assertions and other assertions that are not before the court  
23 in the complaint but I don't need to submit briefing if the  
24 court wants to issue a decision sooner than that.

25 And I object to the state's and other defendants'

1 characterization of this once again as a facial challenge.  
2 This is facial and as applied, not only by the individual  
3 defendants but by the Department of Health. As applied, the  
4 Department of Health has limited, limited the regulations  
5 beyond a broad reading of nationally based evidence, national  
6 evidence-based standards of care and has, you know, through  
7 defendant Rausch-Phung and others, as the complaint details,  
8 instituted a very narrow criteria that excludes hundreds of  
9 medically fragile children who have conditions that fall  
10 outside of that narrow reading, thereby submitting them to  
11 risk.

12 I object to the characterization of the law and the  
13 facts that nobody's being forced to vaccinate. Infringement  
14 on a fundamental right doesn't require complete prohibition,  
15 there is always a penalty of some kind. For example, the  
16 court in *Roman Catholic Diocese v. Cuomo* recently laid out,  
17 had a long discussion about *Jacobson* and how the fact that  
18 the only penalty was a \$5 fine, you know, might allow today  
19 to meet strict scrutiny because he wasn't personally at risk  
20 and he only fixed the \$5 fine which didn't really prohibit  
21 him from exercising that fundamental right to bodily  
22 autonomy. Slightly different than this case which is the  
23 right in cases where you're actually put at risk of physical  
24 harm as certified by a doctor, which *Jacobson* itself said  
25 would be unconstitutional for any court to allow that. And

1 so here, being deprived of any opportunity to go to any  
2 school is a far greater infringement than a \$5 fine, and  
3 there's not the compelling need of that smallpox outbreak to  
4 drive the state's interest to a point where it can justify  
5 such a minor infringement. So we do have to look at the  
6 level of infringement, you know, just analyze under strict  
7 scrutiny. We are looking at well-established fundamental  
8 rights, bodily autonomy, the right to receive medical  
9 treatment, and the right to -- of parents to make these  
10 decisions, but most importantly the right to a medical  
11 exemption, to safeguard one's life and health when their life  
12 and health is at risk. And so that is an independent  
13 determination this court needs to make in each of these  
14 individual cases. Were these children actually at risk of  
15 harm and were they denied a medical exemption even though  
16 they're at risk of harm. And do these regulations create a  
17 situation where children are being placed in that situation.

18 And you know, the complaint provides quite a lot of  
19 detail about why they are being placed in that situation and  
20 they have been placed in that situation. These are very sick  
21 children, and their doctors and specialists think they're at  
22 risk and these school principals and administrators who have  
23 never met them and have never examined their full chart were  
24 not qualified to overrule their treating physicians.

25 And that's really the question before the court, is

1 it really the case that if any school principal randomly got  
2 it right, that would make this law okay, even if hundreds of  
3 children died as a result of this -- these policies. Would  
4 we say -- I mean, why should children have doctors at all?  
5 Why not just go to their school principal directly for any  
6 medical care they have? These are well-protected rights.  
7 Our medical rights are protected through the cases that I  
8 cite in the papers and through many, many Supreme Court  
9 decisions articulating the right to a medical exemption as a  
10 separate right that requires the utmost strict scrutiny.

11 So I will rest there, other than to say that the  
12 individual -- sorry, just two more responses. The *Tangreti*  
13 decision about personal involvement doesn't involve a case  
14 like this where the school principals actually were the  
15 final -- they were personally involved. They may have  
16 consulted with medical professionals but ultimately they made  
17 the decision. So they don't get to just, you know, this  
18 isn't a *respondeat superior* case, this is a decision to  
19 overrule a treating physician, and in some cases such as the  
20 case of the Coe family, the principals allege that they  
21 didn't even follow the advice of Dr. Rausch-Phung anyway,  
22 they made the decision wholly on their own and they provided  
23 no explanation for what it was based on.

24 And the case of a private school, that is really a  
25 fact-based inquiry, it's not just the blanket if you're a

1 private school actor, you can't have liability. The question  
2 is the nature of the right and all of that is in the papers  
3 so to the extent that is relevant, I would rest on my papers  
4 on that issue.

5 THE COURT: Okay. Thank you, Ms. Gibson, and thank  
6 you, all counsel, for your argument. As I mentioned, I do  
7 have to apply the law, I don't -- I have to apply the law  
8 that's been set by the Supreme Court and the Second Circuit.  
9 I will take this case under submission and issue a written  
10 decision. Anything further from any counsel?

11 MR. McCARTIN: No, your Honor.

12 MR. KLEINBERG: No, your Honor.

13 MS. GIBSON: No, Judge, thank you.

14 MS. TASHJIAN: No, your Honor, thank you.

15 MS. RICCARDULLI: No, your Honor, thank you.

16 THE COURT: Okay, thank you to all counsel.

17 MR. McCARTIN: Thank you and happy new year, your  
18 Honor.

19 THE COURT: Happy new year to everyone.

20 (Proceedings Adjourned, 10:47 a.m.)  
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5 I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
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